

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	No. CV-F-07-1679 OWW
	)	No. CR-F-97-5129 OWW
	)	
Plaintiff,	)	MEMORANDUM DECISION AND
	)	ORDER DENYING MOTION BY
vs.	)	JAMES LAMONT RICHARDSON FOR
	)	EXTENSION OF TIME TO FILE
	)	MOTION PURSUANT TO 28 U.S.C.
JAMES LAMONT RICHARDSON,	)	§ 2255 (Doc. 367) AND
	)	DENYING MOTION TO VACATE,
	)	SET ASIDE OR CORRECT
Defendant.	)	SENTENCE PURSUANT TO 28
	)	U.S.C. § 2255 (Doc. 368)
	)	

Before the Court are the motion by Petitioner James Lamont Richardson for an extension of time to file a motion pursuant to 28 U.S.C. § 2255 (Doc. 367) and a motion to vacate, set aside or correct sentence pursuant to Section 2255 filed by Petitioner on November 9, 2007 (Doc. 368).<sup>1</sup>

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<sup>1</sup>The Section 2255 motion was docketed on November 20, 2007. Because Petitioner is incarcerated, the mailbox rule requires that the filing date of the Section 2255 motion is the date it was placed in the prison mail system.

1           A.   MOTION FOR EXTENSION OF TIME TO FILE SECTION 2255  
2   MOTION.

3           On April 27, 2006, the following Order was issued:

4           The clerk of the court is ordered to  
5           reproduce copies of all transcripts from the  
6           jury trial, motions hearings, orders and  
7           sentencing proceedings pertaining to  
8           Defendant James Lamont Richardson. These  
9           copies shall be forwarded to defendant within  
10          30 days of the date of this order along with  
11          a current copy of the case docket.

12          Defendant's motion for an extension of time  
13          in which to file a petition for writ of  
14          habeas corpus under 28 U.S.C. § 2255 is  
15          GRANTED. He shall have one year from receipt  
16          of the above-mentioned transcripts and docket  
17          to file his petition.

18          (Doc. 346). Because Richardson's prison address had changed and  
19          he had not provided a notice of change of address to the Court,  
20          there was delay in complying with the April 27, 2006 Order. By  
21          letter dated September 25, 2006 addressed to Mr. Rawls, Legal  
22          Department, U.S. Penitentiary, Beaumont, Texas, Courtroom Deputy  
23          Greg Lucas, advised: "Enclosed are copies of documents which  
24          Judge Wanger directed be copied by our office and sent to Mr.  
25          Richardson to allow him to perfect his appeal [sic]." (Doc.  
26          352).

27          By letter dated October 7, 2007 and addressed to the  
28          Honorable Judge Wanger, Richardson requests an additional  
29          extension of time to file a motion to vacate, set aside or  
30          correct sentence pursuant to 28 U.S.C. § 2255. Richardson states  
31          in pertinent part:

32                  ... I eventually received a substantial

1 amount of said reproduced copies of  
2 transcripts of my jury trial, motions  
3 hearings, sentencing proceedings and orders  
4 sometime around the end of October 2006 (or  
5 the beginning to middle of November 2006).  
6 However, please note that I did not receive  
7 'all' of the ordered documentation at that  
8 time.

9 As a matter of fact, also please note that I  
10 only recently received the majority of the  
11 missing documents that the Clerk of this  
12 Honorable Court was supposed to have provided  
13 me ... However, please be advised that only  
14 after many months of 'diligent' effort on the  
15 part of myself and my family was I able to  
16 finally obtain much of the missing documents  
17 ...

18 In support of this assertion is filed Richardson's declaration,  
19 wherein he avers in pertinent part:

20 10.) Specifically, absolutely no trial  
21 transcripts were included within said package  
22 of the record of the case documents, which  
23 were mailed to me along with said cover  
24 letter (Dated: 9-25-06).

25 ...

26 12.) However, if the entire truth were to be  
told, the fact that I only just recently  
obtained a substantial number of the record  
of the case documents that were missing from  
the package of documents that had been mailed  
to me (on about 9-25-06) from the Office of  
the Clerk would be revealed.

13.) As a direct result of my 'due  
diligence' and perserverence [sic], as well  
as the aid and assistance of my family and  
friends, I was able to luckily obtain copies  
of said 'missing' trial transcripts from my  
co-defendant's personal file records of his  
legal documents, which were being stored with  
his own family members.

14.) Also, please note verifiable fact that I  
only just received said missing trial  
transcripts from my co-defendant's personal

1 file records (on or about Friday, September  
2 14, 2007) And, as a further matter of fact  
3 please know that the postmark on the U.S.  
Postal Service's Priority Mail envelope is  
dated: September 11, 2007.

4 Petitioner's letter also asserts:

5 I hereby contend and aver that between the  
6 date of April 27<sup>th</sup>, 2006 ... and the drafting  
of this herein letter/motion a substantial  
7 number of 'reasonable delays' accrued from my  
transfer from F.C.I. Victorville, CA. to  
8 U.S.P. Beaumont, TX., as well as from the  
many 'emergency lockdowns' that have been  
imposed here at this United States  
9 Penitentiary.

10 Specifically, inmate on inmate assaults,  
11 inmate on staff assaults, food strikes, and  
severe inclement weather (i.e. thunder storms  
12 and/or electrical storms, heavy fog, and  
significant damage and/or equipment failure  
13 due to hurricane force winds and rain) have  
all contributed to the reasonable delay of me  
14 filing my upcoming habeas action.

15 Attached to Petitioner's letter are copies of various notices of  
16 lockdown status during various times in March, April and May,  
2006, in July, 2006, in October, 2006, and in July, 2007.

17 Pursuant to the Antiterrorism and Effective Death Penalty  
18 Act of 1996 (AEDPA), a one year statute of limitations applies to  
19 the filing of a motion to vacate, set aside or correct sentence  
20 pursuant to 28 U.S.C. § 2255. The limitations period begins to  
21 run from the latest of:

22 (1) the date on which the judgment of  
23 conviction becomes final;

24 (2) the date on which the impediment to make  
25 a motion created by governmental action in  
violation of the Constitution or laws of the  
26 United States is removed, if the movant was  
prevented from making a motion by such

1 governmental action;

2 (3) the date on which the right asserted was  
3 initially recognized by the Supreme Court, if  
4 that right has been newly recognized by the  
5 Supreme Court and made retroactively  
6 applicable to cases on collateral review; or

7 (4) the date on which the facts supporting  
8 the claim or claims presented could have been  
9 discovered through the exercise of due  
10 diligence.

11 AEDPA's one year limitation may be extended by equitable tolling,  
12 but only where "extraordinary circumstances beyond a prisoner's  
13 control make it impossible to file a petition on time."

14 *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9<sup>th</sup>  
15 Cir.2005). Determining whether equitable tolling is appropriate  
16 is a "highly fact-dependent inquiry", *Whalem/Hunt v. Early*, 233  
17 F.3d 1146, 1148 (9<sup>th</sup> Cir.2000), and the movant "bears the burden  
18 of showing that equitable tolling is appropriate." *Gaston v.*  
19 *Palmer*, 417 F.3d 1030, 1034 (9<sup>th</sup> Cir.2005).

20 Defendant has not made the showing required by case law.  
21 Assuming the truth of his averment that the documents mailed to  
22 him by the Clerk's Office on September 25, 2006 did not include  
23 any of the transcripts of Defendant's jury trial, Defendant did  
24 not notify the Court of this lapse until over a year later.  
25 Prompt notification by Defendant would have resulted in the trial  
26 transcripts being copied and mailed to Defendant. Further,  
Defendant provides no evidentiary support for his assertion that  
he received the trial transcripts from one of his co-defendants  
in September 2007 and provides no evidence when he requested

1 copies of the trial transcripts from his co-defendant.

2 With regard to Petitioner's claim that the various lockdowns  
3 of the institution precluded him from filing the Section 2255  
4 motion within the one-year period previously extended by Court  
5 Order, Petitioner makes no showing that the lockdowns made it  
6 impossible for him to file the Section 2255 motion on time.

7 Petitioner received the photocopied court records in late  
8 September, 2006. After the receipt of these records, there were  
9 only two lockdowns, one in October, 2006 and the other in July,  
10 2007. The same is true of Petitioner's claim of severe weather.  
11 Petitioner presents no evidence that the severe weather made it  
12 impossible for him to file the Section 2255 motion on time.

13 Petitioner's motion for an extension of time to file a  
14 motion to vacate, set aside or correct sentence pursuant to 28  
15 U.S.C. § 2255 on the ground of equitable tolling is DENIED.

16 B. MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE.

17 Even if it is concluded that Petitioner is entitled to  
18 equitable tolling and that the motion to vacate, set aside or  
19 correct sentence filed on November 9, 2007 is timely, Petitioner  
20 is not entitled to relief pursuant to Section 2255.

21 Petitioner contends that the evidence admitted by the United  
22 States at trial is insufficient to prove that the robberies of  
23 Videotronics Store and Bill's Bait & Tackle Store of which he was  
24 convicted in violation of 18 U.S.C. § 1951 "obstructed, delayed,  
25 or affected interstate commerce", and to prove that Petitioner  
26 participated in the robbery of a residence on Belmont Avenue.

1        "The 'substantially affects' language in *United States v.*  
2 *Lopez*, 514 U.S. 549, 558-59 ... (1995), and *United States v.*  
3 *Morrison*, 529 U.S. 598, 609 ... (2000), does not displace our  
4 cases requiring only a *de minimus* effect on interstate commerce  
5 to support a Hobbs Act prosecution." *United States v. Boyd*, 480  
6 F.3d 1178, 1179 (9<sup>th</sup> Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 127 S.Ct.  
7 2897 (2007).

8        Petitioner did not raise the sufficiency of the evidence on  
9 direct appeal from his conviction. Objections to the  
10 admissibility or sufficiency of the evidence are not grounds for  
11 relief under Section 2255. See *Rivera v. United States*, 318 F.2d  
12 606, 607 n.2 (9<sup>th</sup> Cir.1963), citing *inter alia*, *Black v. United*  
13 *States*, 269 F.2d 38, 41-42 (9<sup>th</sup> Cir.1959), *cert. denied*, 361 U.S.  
14 938 (1960). Because Petitioner could have raised the sufficiency  
15 of the evidence on direct appeal but nonetheless failed to do so,  
16 he must demonstrate both cause excusing his procedural default  
17 and actual prejudice resulting from the claim of error, or that  
18 he is "actually innocent" of the crime. *United States v.*  
19 *Johnson*, 988 F.2d 941, 945 (9<sup>th</sup> Cir. 1993), citing *United States*  
20 *v. Frady*, 456 U.S. 152, 168 (1982); *Bousley v. United States*, 523  
21 U.S. 614, 622 (1998).

22        Petitioner does not demonstrate either cause for the  
23 procedural default or actual prejudice. To show cause,  
24 Petitioner's claim "must turn on something external to the  
25 defense, such as the novelty of the claim or a denial of  
26 effective assistance of counsel." *Murray v. Carrier*, 477 U.S.

1 478, 494 (1986). Attorney error such as failure to recognize the  
2 factual or legal grounds for a claim or even failure to raise a  
3 recognized claim, short of ineffective assistance of counsel, is  
4 not "cause" for a procedural default. *Id.*, 477 U.S. at 492.  
5 Petitioner presents no claim and makes no showing of ineffective  
6 assistance of counsel. "[T]he prejudice prong of the test  
7 requires demonstrating 'not merely that the errors at ... trial  
8 created a *possibility* of prejudice, but that they worked to his  
9 *actual* and substantial disadvantage, infecting his entire trial  
10 with error of constitutional dimensions.'" *United States v.*  
11 *Braswell*, 501 F.3d 1147, 1150 (9<sup>th</sup> Cir.2007), citing *United*  
12 *States v. Frady*, *supra*, 456 U.S. at 170. Petitioner has made no  
13 such showing.

14 Petitioner does not claim or demonstrate "actual innocence."  
15 "It is important to note in this regard that 'actual innocence'  
16 means factual innocence, not mere legal insufficiency." *Bousley*  
17 *v. United States*, *supra*, 523 U.S. at 623-624. Here, Petitioner  
18 does not claim or demonstrate his factual innocence of the crimes  
19 of which he was convicted; he merely argues the insufficiency of  
20 evidence presented by the United States at trial.

21 Petitioner also contends that he was "charged with theft of  
22 a firearm of a private individual under the Hobbs Act." Citing  
23 *United States v. Collins*, 40 F.3d 95 (5<sup>th</sup> Cir.1984), Petitioner  
24 argues that the evidence presented at trial was insufficient to  
25 demonstrate the required nexus with interstate commerce to  
26 sustain a conviction under the Hobbs Act.



